

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 27, 2009

STATE OF TENNESSEE v. MICHAEL SHANE SMITH

**Direct Appeal from the Criminal Court for Hamilton County
No. 266871 Barry A. Steelman, Judge**

No. E2008-01396-CCA-R3-CD - Filed June 9, 2009

The appellant, Michael Shane Smith, pled guilty in the Hamilton County Criminal Court to reckless aggravated assault with the length and manner of service of the sentence to be determined by the trial court. After a sentencing hearing, the trial court sentenced the appellant to three years to be served in confinement. On appeal, the appellant contends that the trial court improperly enhanced his sentence and should have granted his request for alternative sentencing. Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Charles P. Dupree, Chattanooga, Tennessee, for the appellant, Michael Shane Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; William H. Cox, III, District Attorney General; and Boyd Patterson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that the appellant was indicted for aggravated assault, a Class B felony, and that he pled guilty to reckless aggravated assault, a Class D felony. The appellant has failed to provide this court with a transcript of the guilty plea hearing. However, we have gleaned the following facts from the appellant's presentence report: At the time of the crime, the appellant lived with Jerry Allen Thompson, II, the victim. On October 27, 2007, the victim told the appellant to move out. The victim followed the appellant to the end of the driveway, and they argued over some compact discs (CDs). The two men began fighting, and the appellant pulled a knife. The appellant

cut the victim's right forearm and neck and stabbed the victim five to six inches below his left armpit.

At the sentencing hearing, the victim testified that he had known the appellant for about three years. On October 27, 2007, the victim and the appellant had a "falling out," and the victim told the appellant to move out of the victim's house. Because the appellant owed the victim money, the victim would not allow the appellant to retrieve some CDs that were in the victim's car. The appellant broke into the car, and the victim confronted him. When the victim told the appellant that the police were on their way to the scene, the appellant stabbed the victim under his arm, collapsing his lung. The victim stumbled backward and pulled out his own pocket knife to defend himself. The appellant ran away but was apprehended by police. The victim stated that he spent one and one-half days in the hospital and that he had a scar from the stabbing. The victim said he was suffering from lung cancer, previously had broken his neck and back, and was receiving disability payments. He said the appellant lived with him for eight months and was aware of his ailments. He said he did not know why the appellant had to stab him because "it's not hard to . . . take care of somebody in my situation." The victim recovered fully from the stabbing but said he had become "real careful about who I hang out with now."

On cross-examination, the victim testified that his wife and son also lived in the house. On the day of the crime, the appellant returned home and looked "pretty hung over." The appellant turned over the victim's barbecue grill, and the victim told the appellant to get his "stuff" and leave. The victim denied that the appellant went into the house, came outside, and said that the appellant's identification card and a twenty-dollar bill were missing from underneath a pillow in his bed. The victim stated that the appellant owed him money from back rent and "stuff like that" and that he was not going to return the appellant's CDs until the appellant made some effort to repay him. The appellant packed his clothes and walked down the driveway, and the victim heard the victim's car alarm sounding. The victim confronted the appellant and saw that the CDs were no longer in the car. As soon as the victim told the appellant that the police were on their way, the appellant "just went berserk" and attacked the victim with a pocket knife. The victim stated that he had his own pocket knife in his right front pocket and that the knife could only be opened with both hands. He acknowledged that he pulled the knife out of his pocket and opened it with his right hand while holding his left hand over his punctured lung. He stated that he was born in 1976, and he acknowledged that he had a 2002 conviction for domestic assault.

James Rox of the Tennessee Board of Probation and Parole testified that he prepared the appellant's presentence report. The appellant had prior convictions for domestic violence, domestic assault, attempted aggravated burglary, possession of a weapon with intent to go armed, burglary of an automobile, misdemeanor theft, and criminal impersonation. In the appellant's statement for the report, he claimed that the victim pulled a knife first and that the appellant pulled his knife in self-defense. Rox acknowledged that the appellant expressed remorse by saying in the report, "I feel I reacted to a situation without thinking it through. A decision that could have cost my friend his life. I can never make sorry mean enough to justify the guilt I feel in my heart." On cross-examination, Rox acknowledged that the appellant was convicted of attempted aggravated burglary, possession

of a weapon with intent to go armed, burglary of an automobile, criminal impersonation, and misdemeanor theft when the appellant was eighteen years old and that the appellant was convicted of the remaining two offenses when he was nineteen and twenty-five years old.

The appellant testified that he had been in jail for stabbing the victim since October 27, 2007. Prior to his confinement, he worked as a scuba diving instructor and did construction, landscaping, painting, and tile work. The appellant acknowledged that on the day of the offense, he turned over the victim's grill and the victim told him to leave. The appellant packed his belongings and walked to the end of the road. The victim was waiting for him, and they "[had] some words." The victim accused the appellant of taking the victim's CD case. The two men pushed each other, the victim pulled out his knife, and the appellant pulled out his knife. They lunged at each other, and the appellant cut the victim. The appellant panicked, threw down his knife, and ran. The victim's knife was larger than the appellant's knife, and the appellant believed he acted in self-defense. He stated that if the trial court granted his request for probation, he would live in Knoxville with his father and step-mother and obtain employment. On cross-examination, the appellant acknowledged that he was aware of the victim's cancer and other physical impairments when he stabbed the victim.

The State introduced the appellant's presentence report into evidence. According to the report, the then thirty-year-old appellant dropped out of high school but obtained his GED. The report shows that he completed a scuba diving course in 2007. In the report, the appellant described his current physical health as good but stated that he was diagnosed with oral cancer in 2007 and had growths surgically removed from his gums and jaw. Although the appellant denied receiving mental health services, the presentence investigation revealed that he was ordered to undergo a mental health evaluation after his domestic violence conviction and that he was admitted to Lakeshore Mental Health Center when he was thirteen and nineteen years old for inpatient treatment. In the report, the appellant stated that he began abusing drugs heavily when he was thirteen years old, that he began drinking alcohol when he was sixteen, and that he completed seven substance abuse programs as a juvenile. The report shows that prior to being jailed in the instant case, he worked sporadically as a laborer and telemarketer. The report confirms that the appellant has prior convictions for domestic violence, domestic assault, possession of a weapon with intent to go armed, burglary of an automobile, misdemeanor theft, and criminal impersonation, and that he has two prior convictions for aggravated burglary.

The trial court was "concerned that the nature and characteristics of the criminal conduct is beyond the norm" because the crime involved violence and personal injury to the victim. Regarding enhancement factors, the court found factor (1), that the appellant "has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range," applicable. Tenn. Code Ann. § 40-35-114(1). The court noted that two of the appellant's prior convictions were felonies and that some of his misdemeanor convictions involved violence. In mitigation, the court found that the appellant may have acted under "some degree" of provocation, although not strong provocation, and that he expressed "some degree" of remorse. See Tenn. Code Ann. § 40-35-113(13). The court held that the enhancement factor outweighed the mitigating factors. Given the appellant's prior criminal history at a relatively young age, the court determined

that confinement was necessary to protect society from him. The court also determined that confinement was necessary to avoid depreciating the seriousness of the offense. The court denied the appellant's request for alternative sentencing and ordered that he serve three years as a Range I, standard offender in the Department of Correction.

II. Analysis

The appellant claims that the trial court erred by enhancing his sentence and denying his request for probation. Regarding enhancement factors, the appellant contends that the trial court improperly increased the length of his sentence based upon the victim's vulnerability, that it was "disingenuous" for the State to negotiate a plea agreement with the appellant and then "complain" about the appellant's prior criminal history at the sentencing hearing, and that the trial court's consideration of the nature of the offense at the guilty plea hearing and the sentencing hearing "doubly punished" him. Regarding the trial court's refusal to grant his request for alternative sentencing, the appellant contends that he should have received alternative sentencing because he expressed remorse, his "criminal record was in stages and the violence alleged was when he was 19 years old," and the victim suffered no lasting effects from the stabbing. The State contends that the trial court properly sentenced the appellant. We agree with the State.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting our de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) statistical information provided by the administrative office of the courts regarding sentencing practices for similar offenses in this state; and (7) any statement by the appellant in his own behalf. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

An appellant is eligible for probation if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). Under the 1989 Sentencing Act, sentences which involve confinement are to be based on the following considerations contained in Tennessee Code Annotated section 40-35-103(1):

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, the “potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Tenn. Code Ann. § 40-35-103(5).

Initially, we note that the appellant’s brief cites Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), for the proposition that Tennessee courts are now prohibited from enhancing sentences based upon considerations that do not involve a defendant’s prior convictions or have not been admitted by a defendant. However, effective June 7, 2005, the legislature amended the sentencing code to address the implications of Blakely. Compare Tenn. Code Ann. § 40-35-210(c) (2003) with Tenn. Code Ann. § 40-35-210(c) (2006). Furthermore, as stated previously, the appellant has failed to include the guilty plea hearing transcript in the appellate record for our review. “It is the [appellant’s] duty to have prepared an adequate record in order to allow a meaningful review on appeal.” State v. Goodwin, 909 S.W.2d 35, 43 (Tenn. Crim. App. 1995). Failure to include the guilty plea hearing transcript in the record prohibits the court’s conducting a full de novo review of the sentence under Tennessee Code Annotated section 40-35-210(b), and we presume that the trial court’s ruling on the issue is correct. See State v. Bennett, 798 S.W.2d 783, 789-90 (Tenn. Crim. App. 1990). Regardless, from the record before us, we can conclude that the appellant is not entitled to relief.

First, we find no merit to the appellant’s argument that the trial court improperly increased the length of his sentence based upon the victim’s vulnerability. The sentencing hearing transcript reveals that the only enhancement factor the trial court found applicable was enhancement factor (1) regarding the appellant’s prior criminal history. The trial court did not enhance the appellant’s sentence based upon the victim’s vulnerability.

We also find no merit to the appellant’s claims that it was “disingenuous” for the State to use his criminal history against him at the sentencing hearing or that the trial court’s consideration of the elements and nature of the offense at the guilty plea hearing and the sentencing hearing “doubly punished” him. However, regarding the nature of the offense, we note that this court has stated that in denying an alternative sentence to avoid depreciating the seriousness of an offense, the criminal act should be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree. See State v. Zeolia, 928 S.W.2d 457, 462 (Tenn. Crim. App. 1996). From the facts contained in the record, we conclude that the offense was not particularly

shocking as was found by the trial court. Nevertheless, we do agree that the appellant has an extensive criminal history and that he is not a good candidate for rehabilitation. Based upon those considerations, the trial court properly denied the appellant's request for alternative sentencing.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE